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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 88

UNITED STATES OF AMERICA, PETITIONER

v.

W. G. REYNOLDS AND MARY N. REYNOLDS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The district court did not write an opinion. The opinion of the court of appeals (App. 97), as amended upon denial of rehearing (App. 113), is reported at 404 F. 2d 303.

JURISDICTION

The judgment of the court of appeals was entered on December 9, 1968. A petition for rehearing (App. 105) was filed within the time as extended by the court, and was denied on January 24, 1969 (App. 113). The petition for certiorari was filed April 23, 1969, and was granted on October 13, 1969 (App. 114). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in condemnation proceedings under F.R.Civ.P. 71A(h), it is for the court or for the jury or commission to decide whether certain lands were within the scope of a federal project (in which event the government would not be required to pay any enhancement to the value of the condemned tract brought about by the existence of that project).

2. Whether this scope-of-the-project rule requires a showing that it was decided in the early stages of the project that the particular tract in question would probably be taken, or that some tracts so situated would probably be taken, or a showing only that the land was within the general area influenced by the project and was taken for it.

RULE INVOLVED

Rule 71A(h) of the Federal Rules of Civil Procedure provides in relevant part:

> [I]f there is no * * * specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor * * * unless the court in its discretion orders that * * * the issue of compensation shall be determined by a commission of three persons appointed by it. * * * Trial of all issues shall otherwise be by the court.

STATEMENT

The United States instituted this condemnation proceeding in the United States District Court for the Western District of Kentucky to obtain more than 250 acres of respondents' land in conjunction with construction of the Nolin Reservoir Project. Most of

the land condemned was taken because it would be inundated by the reservoir. About 78 acres, however, were taken for use in the construction of recreational facilities on the shore of the reservoir, as part of the overall project (App. 98), and it is the valuation of this acreage that gives rise to the present controversy.

As a matter of policy, the government has acquired recreational areas in conjunction with federal reservoir projects since 1944.[1]

Although the project involved in this case was congressionally authorized in 1938[2] as part of a comprehensive flood control plan for the Ohio and Mississippi Rivers,[3] Congress first appropriated planning funds for the project in 1956.[4] In July 1958, the Chief of Engineers (Department of the Army) approved a general design memorandum contemplating the construction of appropriate recreational areas, but not specifying where they would be (App. 98). The first funds for construction were appropriated in September 1958.[5] The project was begun in January 1959; although not mentioned in a design memorandum submitted in June of that year, the 78 acres were designated for taking in a memorandum approved in October 1959 (App. 98). Respondents pur-

[1] Act of December 22, 1944, Pub.L. 534, 58 Stat. 887, 889, as amended; Corps of Engineers Manual 1130–2–302.

[2] Flood Control Act of 1938, 52 Stat. 1215, 1217.

[3] See Report of the Chief of Engineers to the House Committee on Flood Control, Com. Doc. No. 1, 75th Cong., 1st Sess.

[4] Public Works Appropriation Act of 1957, 70 Stat. 474, 479.

[5] Public Works Appropriation Act of 1959, 72 Stat. 1572, 1573.

chased the land in question in that month and in January 1960 (App. 98). After filing the complaint in condemnation, the United States filed a declaration of taking on April 18, 1962 (App. 10). The district court's jurisdiction was invoked under 28 U.S.C. 1358, and a jury trial commenced, pursuant to F.R.Civ.P. 71A(h), to determine the issue of just compensation.

At trial, the respondents contended that the designation of the 78 acres in the design memorandum was an afterthought, and, correspondingly, that such land ought to be valued for the lakeside residential and recreational potential it would enjoy on account of the reservoir, rather than for the agricultural uses the land would have continued to enjoy had the reservoir not been built (App. 32–33). After discussion with counsel, the district court first ruled that the valuation witnesses could not testify regarding any element of enhancement due to the project, since the property was within the scope of the project, *United States* v. *Miller*, 317 U.S. 369 * (App. 47–50).

After the jury was sworn, however, the court reversed itself and decided that the scope-of-the project question should be submitted to the jury by special interrogatory, and that enhancement evidence therefore could be received (App. 51–53). The landowners presented opinions of value both including and excluding enhancement from the project. In accordance with the accepted formula for evaluating compensation to condemnees, the government's witness testified

* The district court and counsel agreed that the *Miller* decision applied in this case (App. 30).

to the value of the entire tract, including the 78 acres, on the date of taking, excluding enhancement, and the value of the remainder, including enhancement. The valuations of the amount of compensation owed to respondents ranged from $188,230 for the respondents to $8,900 for the government. The jury found that the land was probably within the scope of the project from the time the government was committed to it and returned a verdict of $20,000 (App. 94).

On respondents' appeal, the court of appeals held that the scope-of-the project issue was for the jury. It reversed upon finding that the lower court had improperly commented on evidence not heard by the jury relating to this question. In response to the government's petition for rehearing, which was denied, the court amended its opinion by inserting the following footnote (App. 113):

> After argument of counsel and submission to the Court, *Amen Wardy* v. *United States*, —— F. 2d —— (5th Cir. 1968) was called to this Court's attention. We do not adhere to the ruling in *Wardy*, supra, for under the facts presented in the principal case the scope of the project is so interrelated with the valuation as to bring it within the issue of just compensation and therefore was a proper matter in jury determination.

The United States petitioned for a writ of certiorari on that issue and to clarify what is intended by "scope of the project." The petition was granted on October 13, 1969.

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SUMMARY OF ARGUMENT

I

In limiting the jury's role to deciding the issue of just compensation, Rule 71A(h) requires the court to decide whether the property taken was within the scope of the project. Even before the adoption of Rule 71A(h), this Court, in the case of *United States* v. *Miller,* 317 U.S. 369, concluded that the scope-of-the-project question is primarily legal in nature and is therefore appropriate for decision by the trial court. The language of Rule 71A(h) makes it clear that the draftsmen of the Rule intended that the trial court should instruct the jury as to the proper criteria for evaluating condemned property, and the Fourth, Fifth and Ninth Circuits have held that under Rule 71A(h) the scope-of-the-project question must be decided by the trial court.

The Sixth Circuit's reasoning, that the scope-of-the-project question is so interrelated with valuation as to bring it within the issue of just compensation, and therefore, within the province of the jury, is erroneous, because the relationship between factual questions and the legal criteria for deciding those questions does not affect the responsibility of the trial court to instruct the jury as to what factors it ought to consider in reaching its verdict. Furthermore, allowing the jury to decide the scope-of-the-project question would require that the jury hear evidence of enhancement, and would increase the likelihood that through compromise, confusion, or inadvertence the jury will en-

large condemnation awards to include enhancement values even though they decide that the taking was within the scope of the project.

II

The scope-of-the-project test requires only a showing that the land taken was within the project's area of influence in order to exclude enhancement due to that project. In the *Miller* case, this Court stated the rationale of the scope-of-the-project rule, that landowners ought not gain by speculating on the enhanced values which they might realize, in the event of condemnation, as a result of the very project for which their property is condemned. There has been substantial confusion among the circuit courts in applying the scope-of-the-project test. Generally the circuits have erroneously required that the original project plans delineate specific lands or uses. This view is inconsistent with the rationale of the *Miller* case, and unjustifiably increases the cost that the public pays. This court should clarify its position on the scope-of-the-project rule, and direct the lower courts to focus their inquiry on whether the land was within the general area influenced by the project for which it was taken. Any more restrictive interpretation would encourage speculation on the possibility that land will be condemned and would interfere with the orderly development of government projects by encouraging agencies in the early stages of projects to overestimate their needs.

ARGUMENT

I. IN LIMITING THE JURY'S ROLE TO DECIDING THE ISSUE OF JUST COMPENSATION, RULE 71A(h) REQUIRES THE COURT TO DECIDE WHETHER THE PROPERTY TAKEN WAS WITHIN THE SCOPE OF THE PROPECT

Rule 71A(h) of the Federal Rules of Civil Procedure provides that, except in circumstances not relevant here, any party to a federal eminent domain proceeding "may have a trial by jury of the issue of just compensation * * *," unless the trial court determines, in its discretion, that the issue should be decided by a three-man commission. As the Rule specifies, "Trial of all issues shall otherwise be by the court." The concept of the Rule is straightforward: all issues other than compensation, whether legal or factual, are to be decided by the district court. *Wardy* v. *United States,* 402 F. 2d 762, 763 (C.A. 5); *Scott Lumber Company* v. *United States,* 390 F. 2d 388, 392 (C.A. 9); *United States* v. *91.69 Acres in Oconee County,* 334 F. 2d 229, 231 (C.A. 4); 7 Moore, *Federal Practice* (2d ed. 1968) par. 71A.90[3], p. 2799; cf. 1 Nichols, *Eminent Domain* (3d ed. 1964) p. 524. This limitation on the scope of a jury trial convened under Rule 71A(h) is permissible, for, as Rule 71A(h) itself recognizes by its provision for trial to commissioners, there is no constitutional right to jury trial in eminent domain proceedings. See *Bauman* v. *Ross,* 167 U.S. 548, 593; *Sykes* v. *United States,* 392 F. 2d 735 (C.A. 8); 5 Moore, *Federal Practice* (2d ed. 1968) par. 38.32[1], p. 239.

The critical inquiry, then, is: Does the "issue of just compensation" (as that term is used in the

Rule) comprehend the question w hether the con-
demned property was within the original "scope
of the project" for which the tak ing occurred (in
which event, under this Court's h olding in *United*
States v. *Miller*, 317 U.S. 369, the g overnment is not
required to pay any enhancement to the value of the
property brought about by the exist ence of the proj-
ect)? In *Miller*, which was decided be fore the adoption
of Rule 71A(h), the district court de cided on its own,
after considerable argument, that the tract in question
was within the scope of the project; accordingly, the
court excluded evidence of enhancement of value, and
instructed the jury to ignore any increment in value
due to enhancement. This Court held that "in so
charging the jury the trial court was correct." (*id.* at
379). Although the question was not explicitly dis-
cussed, the *Miller* Court seems to have concluded, even
before Rule 71A(h), that the scope-of-the-project
question is primarily legal in nature and is therefore
appropriate for decision by the trial court.

The adoption of Rule 71A imposed procedural uni-
formity on the federal courts in eminent domain pro-
ceedings, and ended the practice in most district courts
of following state law on procedural matters, includ-
ing allocation of function between judge and jury.
(See Advisory Committee Notes to Rule 71A). The
sweeping language of the last sentence of Rule 71A
(h), considered with the fact that the Rule allows
the trial court in its discretion to eliminate the jury
altogether and to appoint a commission to decide the
issue of just compensation, is substantial evidence that
the drafters of the Rule envisioned a broad role for

the trial court in eminent domain proceedings. This includes instructing the jury or commission as to the proper criteria for evaluating the condemned property, and would require the court to determine whether the jury or commission should consider enhancement in value due to the existence of the project for which the property is condemned.

Since the adoption of Rule 71A(h), the Fourth, Fifth and Ninth Circuits have recognized that the jury's or commission's function must be limited to the question of valuing the property taken under the criteria provided in the court's instructions. *Oconee County, supra; Wardy, supra; Scott Lumber Company, supra.* Most recently the Fifth Circuit in *Wardy* has held that the Rule treats the scope-of-the-project question as one for the judge (402 F.2d at 763):

> The question was whether appellants' "lands were probably within the scope of the project from the time the Government was committed to it." *Miller, supra* at 377. * * * Appellants contend that the jury should have been allowed to answer this question. Under rule 71A(h) the jury's function is limited to determining "just compensation." It is the duty of the court to decide the legal issues, as well as all other fact issues. [Citations omitted.] *Thus, instead of infringing on the jury's functions, the judge merely decided a legal question which limited the factors necessary to the determination of "just compensation."* [Emphasis supplied.]

In the present case, the district court and the Sixth Circuit rejected the Fifth Circuit's analysis and concluded that the question whether the taking of 78

acres for recreational uses was within the scope of the project in the *Miller* sense was a jury issue; consequently, testimony of the enhanced value of the land for lakeside residential and recreational purposes was admitted. The Sixth Circuit reasoned that the scope-of-the-project question is so interrelated with valuation as to bring it within the issue of just compensation and, therefore, within the province of the jury, citing *Miller, supra,* and *John L. Roper Lumber Co.* v. *United States,* 150 F. 2d 329 (C.A. 4). That rationale, we submit, is unsound.

Obviously, the scope of the project will be, in all cases, related to the valuation of the property condemned for that project, in the same sense that the legal criteria for deciding any factual questions are related to that question. However, as *Wardy* and numerous other cases in other areas of the law illustrate, cf. *United States* v. *Merz,* 376 U.S. 192, 198, the relationship between legal criteria and the factual determinations to which they are applied in no way diminishes the court's responsibility to instruct the jury as to what factors it should consider in reaching its verdict, particularly under a standard such as that set forth in Rule 71A(h), which is so expansive of the trial court's duties.

Neither *Miller* nor *Roper,* decided by the Fourth Circuit, controverts our view of Rule 71A(h). Indeed, it is difficult to see on what basis the Sixth Circuit concluded that *Miller* supports its position, since, as we have discussed, *Miller* not only antedated Rule 71A(h), but also approved the trial court's determination to exclude evidence of enhancement. As for

Roper, that case, like a similar Fifth Circuit case, *Scott* v. *United States,* 146 F.2d 131, was decided before the adoption of Rule 71A(h). Since that time, both the Fourth and Fifth Circuits have recognized that Rule 71A(h) requires the court to determine the scope of the project. *Oconee County, supra; Wardy, supra.*

In addition to the inherent suitability of this issue to judicial determination, there are important reasons to exclude the scope-of-the-project question from jury consideration. One purpose of Rule 71A(h) is to assure that only those factors which are properly elements of valuation reach the jury or commission. Yet, if the jury must decide whether or not a particular taking came within the scope of the project, unless there is a bifurcated trial it will also receive the evidence of enhancement which a trial judge deciding the issue might exclude as irrelevant to valuation. This not only makes the jury's role considerably more complex, but raises the real possibility that through compromise, confusion, or inadvertence, juries will enlarge condemnation awards in view of the enhancement values they have heard, even though they decide that the taking was within the scope of the project. Cf. *United States* v. *Merz, supra,* 376 U.S. at 198; *Jackson* v. *Denno,* 378 U.S. 368; *Bruton* v. *United States,* 391 U.S. 123. The law does not give the jury a choice whether a particular condemnee shall receive some enhancement because of the government project.[7] Yet that is the practical effect of

[7] As this Court has frequently noted, it is as important in condemnation cases to see that the public does not pay too

submitting the scope-of-the-project question to a jury, since that submission permits the landowner to put his evidence of enhancement value before them.[8]

II. THE SCOPE-OF-THE-PROJECT TEST REQUIRES ONLY A SHOWING THAT THE LAND TAKEN WAS WITHIN THE PROJECT'S AREA OF INFLUENCE IN ORDER TO EXCLUDE ENHANCEMENT DUE TO THAT PROJECT

In the *Miller* case, *supra*, this Court upheld the district court's exclusion of valuation testimony enlarged by the development of the federal project for which the land was taken. In so doing, the Court contemplated two situations where the exclusion of enhancement would arise: (1) where the land was clearly within the confines of the project at its inception and the condemnation was simply delayed; and (2) where the land was within the area where it was likely to be taken, but might not be taken. 317 U.S. at 379. The land in *Miller* came within the latter category. The Court phrased the test for excluding enhancement as follows (317 U.S. at 377):

> The question then is whether the respondents' lands were probably within the scope of the project from the time the Government was committed to it. If they were not, but were

much as that the owner does not receive too little. *E.g.*, *United States* v. *Commodities Trading Corp.*, 339 U.S. 121, 123; *United States v. New River Collieries Co.*, 262 U.S. 341; *Bauman* v. *Ross*, *supra*, 167 U.S. at 574–575.

[8] We note that the adverse impact of the Sixth Circuit's ruling was increased by the recent congressional application of Rule 71A(h) to condemnations by the Tennessee Valley Authority. Pub. L. 90–536, 82 Stat. 885 (Sept. 28, 1968).

> merely adjacent lands, the subsequent enlargement of the project to include them ought not to deprive the respondents of the value added in the meantime by the proximity of the improvement. If, on the other hand, they were, the Government ought not to pay any increase in value arising from the known fact that the lands probably would be condemned. *The owners ought not to gain by speculating on probable increase in value due to the Government's activities.* (Emphasis added.)*

The *Miller* principle is thus founded on elementary fairness and has been applied in many contexts. See *United States* v. *Cors*, 337 U.S. 325, 332–334; *Cameron Development Co.* v. *United States*, 145 F.2d 209, 210 (C.A. 5); *United States* v. *Rayno*, 136 F.2d 376, 378–379 (C.A. 1), certiorari denied, 320 U.S. 776; *United States* v. *2,477.79 Acres in Bell County, Tex.* (*Bowles*), 259 F.2d 23, 27 (C.A. 5); *United States* v. *158.76 Acres in Windham County, Vt.*, 298 F.2d 559 (C.A. 2); *United States* v. *Whitehurst*, 337 F.2d 765 (C.A. 4).

However, application of this "scope of the project" test has resulted in substantial confusion among the circuits, which are often called upon to apply the test in fact situations similar to that presented here—condemnation to create public recreation areas or similar

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* Conversely, if a project depresses land values, the government cannot discharge its obligations to provide just compensation by paying project-depreciated prices. *United States* v. *Virginia Electric & Power Co.*, 365 U.S. 624, 630, 635–636; *United States* v. *74.60 Acres in Miami County, Ind.* (*Conn*), 358 F.2d 143, 145 (C.A. 7); *Murray* v. *United States*, 130 F.2d 442, 444 (C.A. D.C.).

facilities on the shore of a federally constructed dam and reservoir. Thus, the Third Circuit has adopted a restricted view of the *Miller* test, which binds the government literally by the "original design," rather than the general purposes of the project, and permits no flexibility as the planning proceeds during the execution of the project. Moreover, the Third Circuit test requires "indicat[ion] at the outset" that "a particular tract or area" will probably be acquired. *United States* v. *959.68 Acres in Mercer County, Pa.* (*Burdette*), 415 F. 2d 401; *United States* v. *172.80 Acres in Mercer County, Pa.* (*Totten*), 350 F. 2d 957. In the Eighth Circuit, on the other hand, it is sufficient to exclude enhanced values if, at the time the government becomes committed [10] to the project, it is clear that some of the land around the reservoir pool will be taken for a use specified in those plans, even though the particular land is not identified. *United States* v. *First Pyramid Life Ins. Co. of America*, 382 F. 2d 804; *United States* v. *Crance*, 341 F. 2d 161, certiorari denied, 382 U.S. 815. In the proceedings below, the district court, in its special interrogatory and charge to the jury, appears to have adopted the Third Circuit view (App. 86); the court of appeals stated the *Miller* test and then cited the

[10] As the Eighth Circuit makes clear in its opinion, "committed" in this sense does not refer to any legal obligation on the government's part, since only the filing of a declaration of taking would legally obligate the United States as to particular property or estates. *Miller* reasonably regarded the appropriation of funds for construction as the first indication that a project would be built and that from that point on any enhancement due to the project would not be recoverable by the condemnees.

Eighth Circuit cases without attempting to apply the test to the particular tract in question [11] (App. 100).

We believe that the Eighth Circuit's view of the scope-of-the-project rule is closer to the meaning of this Court's decision than is the view of the Third Circuit. Neither circuit court, however, has, in our opinion, sufficiently followed this Court's admonition in *Miller* that "The owners ought not to gain by speculating on probable increase in value due to the Government's activities." 317 U.S. at 377.

In light of this key statement, we question the Eighth Circuit's view that the exclusion of enhancement should be restricted to those takings for which the specific uses are delineated in whatever plans are extant at the time Congress first appropriates construction funds. The language and holding in *Miller* indicate strongly that this Court intended that the cost of a government project should not be increased by the value of the benefits conferred by the project itself. It is true that both in *Miller* and in the earlier case of *Shoemaker* v. *United States,* 147 U.S. 282, the plans indicated that some lands, not then identified, would be taken for certain project purposes during later phases of the project. Nothing in the Court's opinion in either case, however, suggests that the presence of these vague plans was crucial to this Court's analysis.

The planning and execution of major public projects may take years. A test which ties the question of enhancement to the four corners of the original

[11] "If recreational areas were [within the scope of the project], then the landowner would not be entitled to any enhanced value due to the project" (App. 100).

plans—even in general terms—may significantly and unjustifiably increase the costs the public pays. Thus, preliminary plans for a dam may indicate a certain height, yet final plans may increase that height as a result of further engineering studies. If the increase is not originally designated and is therefore treated as a "subsequent, independent enlargement" of the project, speculation will be rewarded, and the public purse injured.

In the instant case, recreational areas were required to be included at some point in the planning of the project,[12] in line with Congressional policy.[13] Under *Miller,* omission of this phase of the project from initial plans should not give rise to a right of condemnees to "gain by speculating" on the enhanced values brought about by the project. As the Court of Claims said of the situation before it in *Smither* v. *United States,* 117 C. Cls. 574, 580, 91 F. Supp. 582, 583, certiorari denied, 340 U.S. 931, "Here there were not separate takings; there was only one project and one taking."[14]

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[12] Corps of Engineers Manual 1130–2–302.

[13] See note 1, *supra.*

[14] In *United States* v. *2,353.28 Acres in Brevard and Volusia Counties, Fla.* (*Colton*), 414 F.2d 965 (C.A. 5), a taking of land for a subsequent enlargement of the lunar launch site at Cape Kennedy was held not to be within the confines of the original project. This was because NASA officials had repeatedly stated in public testimony to the congressional committee, and otherwise publicly, that no enlargement would be needed. In addition, when funds were sought for the extension, they acknowledged that the expansion resulted from bringing to this NASA facility a program of the Department of Defense. See also *Scott* v. *United States,* 146 F.2d 131 (C.A. 5), where enlargement of an Army

If *Miller* leaves any doubt as to whether landowners can gain by forcing the government to pay for the enhanced value resulting from the very project for which their property is taken, merely because these particular properties or their ultimate uses are not delineated in the original plans, this Court should clarify its position on the scope of the project rule and reaffirm its intention to prevent speculation at the government's expense on the benefits of a government project. We submit that the relevant inquiry under the scope of the project rule should be whether the land was within the general area influenced by the project for which it was taken. In this sense, the word "project" refers to the general purposes which the government is trying to achieve, rather than to the detailed means of accomplishing these purposes, because the details are always likely to be altered by the facts developed during construction. Cf. *Woodville* v. *United States*, 152 F. 2d 735, 738 (C.A. 10); *United States* v. *Rayno*, 136 F. 2d 376, 379 (C. A. 1), certiorari denied, 320 U. S. 776; *United States* v. *Certain Parcels of Land in Fairfax County* (*Belle Haven*), 228 F. 2d 280, 283 (C. A. 4), certiorari denied, 351 U. S. 907.

Any more restrictive interpretation of the scope-of-the-project rule would encourage landowners to speculate on the likelihood that the government will condemn their lands and then, if condemnation occurs,

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base, as a result of the Selective Service Act, was held to be an independent project. But compare *John L. Roper Lumber Company* v. *United States*, 150 F.2d 329, 332 (C.A. 4), reaching a contrary result, respecting enlargement of a Marine Corps base.

to claim, ironically, that they are entitled to the enhanced values brought about by the project on the ground that it was not certain at the time the original project plans were drafted that the taking would occur. Correspondingly, such a restriction would also interfere with the orderly development of any project because it would encourage acquiring agencies to overestimate, in early planning stages, the lands needed to complete the project, on pain of being held liable subsequently for project-created values. This is inherently unfair and would be disruptive and inconvenient to individual landowners and local communities, as well as to government.

We recognize that there will be cases where enjoyment of the enhanced value created by the project has begun, or investments have been made in reliance on what may appear as fixed plans.[15] Yet it is only practical to realize that the planning of federal projects cannot totally precede their construction and that some changes in plans must be anticipated. Where the orderly development of the project requires the acquisition of land not previously drafted into engineering plans, the public should not have to pay for this needed flexibility by condemnation awards inflated to reflect expectations that the project would be constructed in a different way.

It is clear that the land here involved was taken for an essential feature of the Nolin Reservoir Pro-

[15] These and other noncompensable equities are also recognized by Congress. See S. 1, "Uniform Relocation Assistance and Land Acquisition Policies Act of 1969," Secs. 201, 301, and S. Rep. No. 91–488, 91st Cong., 1st Sess., Oct. 21, 1969.

ject and not for some other or additional project. Consequently, under *Miller*, no enhancement attributable to that project should be payable by the public. The landowner is fully compensated for what he had—agricultural property—but not for what the government created at great cost—lakeshore property.[16]

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be modified, with instructions to direct the district court on remand to determine itself whether the condemned lands were within the scope of the project, under the clarified standards set forth by this Court.

Respectfully submitted,

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[16] The *Miller* rule does not change the date of taking or exclude increases in values before the actual taking due to causes other than the project.

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